Mut. Ins. Co., 526 U.S. at 57; *Blum*, 457 U.S. at 1004). The *Rayburn* court also pointed out that mere inclusion of foster parents in the definition of "state employee" within the Georgia Tort Claims Act did not alter this conclusion, since merely extending governmental tort liability and immunity rules to foster parents creates a tenuous relationship between foster parents and the State, at best. *Id.* at 1349 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 527-8 (1985)). As there was no evidence that the State was a joint participant in the alleged child abuse, the Eleventh Circuit concluded that the Hogues were not state actors. *Id.* Based upon this binding precedent, the lower courts in this matter correctly held that Ms. Jackson and Mr. Hammonds were not state actors subject to liability pursuant to § 1983.

The Eleventh Circuit based its decision in this case on its holding in *Rayburn*. Virtually every other court to consider the issue has reached the same conclusion. *See, e.g., Leshko v. Servis*, 423 F.3d 337, 341, n.3 (3d Cir. 2005) (citing *Rayburn* with approval); *Weller v. Dep't of Social Servs.*, 901 F.2d 387, 392 (4th Cir. 1990); *Milburn v. Ann Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990); *Marr*, 307 F. Supp. 2d at 133-4. The only case in which a foster parent could be deemed a state actor is if there is evidence that state social workers had knowledge of abuse, and it is undisputed that there is no such evidence in this case. *See, e.g., K.H. through Murphy v. Morgan*, 914 F.2d at 852 (foster parent can only be considered a state actor when the state knows or suspects the foster parent is an abuser); *Howard*, 270 F. Supp. 2d at 144 (allegation that state officials knew a foster parent

was abusing a child and they colluded to cover up the abuse sufficient to state a claim under "nexus" or "entwinement" tests). As a result, Petitioner has failed to provide any compelling reason why this Court should grant the petition, as the lower court rulings in this matter are absolutely consistent with the rulings of every United States Court of Appeals on this issue.

II. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS IN *WEST* AND *BRENTWOOD*.

West v. Atkins supports the Eleventh Circuit's decision in this case. *West* involved the delegation of a traditionally exclusive mandatory state function – provision of medical care to inmates – through a contract of employment with a physician. *West v. Atkins*, 487 U.S. 42, 51-2 (1988). This Court noted the physician in *West* functioned as the sole means of providing medical care to inmates. *Id.* at 54. This Court concluded that the physicians were vested with the authority to perform a *mandatory state function* and were state actors, regardless of the fact they were "independent contractors" rather than "state employees," and noted the importance of evaluating an individual's function rather than such labels in determining whether he is a state actor. *Id.* at 55-6; *see also*, *Brentwood Academy*, 531 U.S. at 296 (citing *West* and noting that "[w]e have treated a nominally private entity as a state actor . . . when it has been delegated a public function by the State").

This Court has held that in evaluating whether a private entity is performing a public function, "the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (*quoting Jackson*

v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)). "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (citing *Jackson*, 419 U.S. at 356). It is clearly established that foster care, unlike the provision of medical care to inmates, is not an exclusive state function, therefore this Court's ruling in *West* cannot convert foster parents into state actors. *See Leshko*, 423 F.3d at 347; *Milburn*, 871 F.2d at 479; *Rayburn*, 241 F.3d at 1347; *Marr*, 307 F. Supp. 2d at 134; *Lintz*, 807 F. Supp. at 1306. Furthermore, the provision of day-to-day care to foster children in a private residence is not analogous to the provision of medical care to inmates. *Leshko*, 423 F.3d at 346 ("[i]t is fair to say that a primary goal of foster care is to replicate as closely as possible the traditional family setting in which children are cared for and raised" "whereas in West the tight security-based strictures of prison life affected the 'nature, timing, and form of medical care provided to inmates'"). "Foster homes operated by private citizens are not comparable to state institutions that might more accurately be characterized by the terms 'incarceration' and 'institutionalization.'" *Pfoltzer*, 775 F. Supp. at 885, n.2.

In the 18 years since *West* was decided, not one of the numerous federal courts that have analyzed whether foster parents are state actors has concluded that *West* converts these private citizens into state actors. *See Leshko v. Servis*, 423 F.3d 337, 347 (3d Cir. 2005); *Weller v. Dep't of Social Servs.*, 901 F.2d 387, 392 (4th Cir. 1990); *Milburn v. Ann Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 852

(7th Cir. 1990); *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001); *Marr v. Schofield*, 307 F. Supp. 2d 130, 134 (D. Me. 2004); *P.G. v. Ramsey County*, 141 F. Supp. 2d 1220, 1226 (D. Minn. 2001); *Walker v. Johnson*, 891 F. Supp. 1040, 1050 (M.D. Pa. 1995); *McCrum v. Elkhardt Dep't of Public Welfare*, 806 F. Supp. 203, 208 (N.D. Ind. 1992); *Lintz v. Skipski*, 807 F. Supp. 1299, 1307 (W.D. Mich. 1992); *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874, 884 (E.D. Va. 1991). In fact, every court to apply *West* to this issue has specifically rejected the argument raised by Petitioner. *Leshko*, 423 F.3d at 347; *Marr*, 307 F. Supp. 2d at 135, n.2. Recently, the Third Circuit specifically analyzed *West* and concluded that "providing hands-on care [to children] has never been, and is not now, an exclusively governmental function." *Leshko*, 423 F.3d at 344. The *Leshko* court specifically distinguished *West*, noting "'the power that a state exercises over a person whose liberty is restricted as a result of a criminal conviction or involuntary civil commitment' 'is quintessentially governmental, but a legal guardian's authority over a minor is not.'" *Id.* at 347 (*quoting Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 162 (3d Cir. 2001)). Clearly, the Eleventh Circuit's decision in this case is consistent with this Court's ruling in *West v. Atkins*.

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) also supports the decision of the Eleventh Circuit. In *Brentwood Academy*, this Court employed a fact-intensive analysis in concluding that the relationship between the State and a nominally private athletic association "show[ed] pervasive entwinement to the point of largely overlapping identity." *Id.* at 303. In reaching this conclusion, this Court noted that 84 percent of the association's membership consisted of public school

officials, acting in their official capacity and performing all but the purely ministerial acts by which the Association existed and functioned, therefore this Court found regulatory action by the association constituted state action. *Id.* at 299-300. However, this Court noted that "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the state itself.'" *Id.* at 295.

This Court's ruling in *Brentwood Academy* supports the conclusion that Respondents were not state actors, as there is no entwinement, pervasive or otherwise, between foster parents and the State. Petitioner contends that State regulation and oversight of foster care constitutes "pervasive entwinement" sufficient to render foster parents state actors. However, this Court and the lower courts have repeatedly made it clear that mere funding, licensing, or regulation of an individual or entity alone is insufficient for a finding of state action. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543-4 (1987); *Mentavlos v. Anderson*, 249 F.3d 301, 320 (4th Cir. 2001); *see also, Blum*, 457 U.S. at 1004 (mere fact that an individual is "subject to state regulation does not by itself convert its action into that of the State."); *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353 (conduct by a private entity is not state action just because subject to state regulation or business "affected with the public interest."); *Milburn*, 871 F.2d at 477 (licensing and supervision of foster homes by state insufficient to render foster parents state actors); *Walker*, 891 F. Supp. at 1051 ("while it is true that foster parents are required to be licensed and are subject to state controls and receive state monies for the care of the children in their charge, these

factors alone do not render them state actors"). "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *American Mfrs. Mut. Ins. Co.*, 526 U.S. at 52. Furthermore, every Circuit to address the issue has consistently found that the mere extension of tort immunity is insufficient to render foster parents state actors. *Leshko*, 423 F.3d at 342-3 (although foster parents are defined as public employees for purposes of being granted immunity under the state tort claims act, such labels alone are not dispositive for determining whether an individual is a state actor; instead it is essential to look to the function the individual serves in determining whether there is state action); *Rayburn*, 241 F.3d at 1318.

The specific arguments raised by Petitioner have been consistently rejected by every court to address the issue, all of which have found that foster parents are not state actors based upon the "pervasive entwinement" analysis of *Brentwood*. *Leshko v. Servis*, 423 F.3d 337, 340-1 (3d Cir. 2005) (regulation and oversight of foster care and designation of foster parents as public employees for purposes of immunity insufficient to establish entwinement such that "the state's fingerprints" are on the challenged conduct); *Marr v. Schofield*, 307 F. Supp. 2d 130, 133-5 (D. Me. 2004) (fact that foster care is created by state statutes and regulations, foster parents received payments from the state, and they are governed by rules and regulations promulgated and enforced by the Department of Human Services insufficient to render state actors under any state action analysis, including "entwinement" analysis); *P.G. v. Ramsey County*, 141 F. Supp. 2d 1220 (D. Minn. 2001) (finding it clear that foster parents do not act under color of state law). As a result, the holding of the Eleventh

Circuit is consistent with the binding precedent of this Court and certiorari should not be granted.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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